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 7 GROUP, INC., f/k/a DRUGMAX, INC., a Nevada corporation and
 8 Cross-Complainant FAMILYMEDS, INC., a Connecticut
 corporation

9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

13 MCKESSON CORPORATION, a Delaware
 14 corporation,

15 Plaintiff,

16 v.

17 FAMILYMEDS GROUP, INC., f/k/a
 18 DRUGMAX, INC., a Nevada corporation,

19 Defendant.

20 FAMILYMEDS GROUP, INC., f/k/a
 21 DRUGMAX, INC., a Nevada corporation,

22 Counterclaimant,

23 v.

24 MCKESSON CORPORATION, a Delaware
 25 corporation,

26 Counterdefendant.

27 FAMILYMEDS, INC., a Connecticut
 28 corporation,

29 Cross-Complainant,

30 v.

31 MCKESSON CORPORATION, a Delaware
 32 corporation,

33 Cross-Defendant.

34 CASE NO. CV07-5715 WDB

35 **ADMINISTRATIVE MOTION TO FILE
 36 DOCUMENTS UNDER SEAL**

37 **Local Rule 7-95**

38 **Accompanying papers:** Kenefick Declaration;
 39 and (Proposed) Order

40 Complaint filed: Nov. 9, 2007
 41 Counterclaim filed: Dec. 17, 2007
 42 Cross-Complaint Filed: Dec. 17, 2007
 43 Trial date: none set

1 **I. RELIEF REQUESTED**

2 By this Administrative Motion to File Documents Under Seal (this "**Administrative**
3 **Motion**") Defendant and Counterclaimant Familiy whole Group, Inc., f/k/a Drugmax, Inc., a Nevada
4 corporation ("**FM Group**") and Cross-Complainant Familiy whole Group, Inc., a Connecticut corporation
5 ("**FM Inc.**") (collectively, "**Familiy whole Group**") seek to file under seal documents in opposition to
6 McKesson Corporation's ("**McKesson**") Motion for Summary Judgment, or, in the Alternative,
7 Summary Adjudication (the "**MSJ**"). The basis for this request is that the affected documents
8 contain, discuss, and disclose information which McKesson has identified as trade secret.

9 **II. FACTUAL AND PROCEDURAL BACKGROUND**

10 **A. The Agreements In-Issue**

11 This lawsuit involves claims for breach of contract and accounting. The relationship
12 between the parties is governed by the following contractual agreements.

13 **1. The First Agreement**

14 On December 28, 2004, FM Inc., Valley Drug Company South, and D&K Healthcare
15 Resources, Inc. ("**D&K**") entered into that certain Prime Warehouse Supplier Agreement (the "**First**
16 **Agreement**"), which provided for D&K to sell and FM Inc. and Valley Drug to buy pharmaceutical
17 products. The First Agreement provided for a term of two (2) years, commencing on December 28,
18 2004. The First Agreement, at paragraph 18, provides that the terms set forth therein are to be
19 treated as confidential and disclosure is to be limited to employees of the parties which have a
20 reasonable need to have access to such information.

21 **2. The First Amendment**

22 On December 27, 2005, DrugMax (which amended its articles of incorporation on July 10,
23 2006, to change its name to Familiy whole Group, Inc., a Nevada corporation and is referred to herein
24 as "**FM Group**"), FM, Inc., and D&K entered in that certain written First Amendment to Prime
25 Warehouse Supplier Agreement, which provided, *inter alia*, to amend certain terms of the First
26 Agreement (the First Agreement, as amended, shall be referred to herein as the "**First**
27 **Amendment**"). The First Amendment did not modify paragraph 18 of the First Agreement, which
28 therefore subsisted and the provisions of the First Amendment were therefore designated

1 confidential.

2 **3. The Supply Agreement**

3 On or about February 2, 2007, FM Group and McKesson entered into that certain written
4 Supply Agreement (the "**Supply Agreement**") which provided for McKesson to sell and FM Group
5 to buy pharmaceutical products. The Supply Agreement was effective as of December 28, 2006,
6 and provided for a term of three (3) years. Familymeds was invoiced for \$60,286,260.08 under the
7 Supply Agreement. Paragraph 13 of the Supply Agreement designated the terms of that agreement
8 as proprietary and confidential.

9 The First Agreement, the First Amendment, and the Supply Agreement are collectively
10 referred to herein as the "**Agreements**."

11 **B. Confidential Provisions Of The Agreements**

12 Each of the Agreements are, by their terms, designated as confidential. McKesson has also
13 identified these terms as confidential. These confidential terms, however, are in-issue in this
14 Action.

15 **C. Discovery**

16 During the course of discovery, McKesson has produced materials which it has designated
17 as confidential.

18 **D. Motion For Summary Judgment**

19 On June 4, 2008, McKesson filed its MSJ. In its MSJ, McKesson seeks an adjudication that
20 it is entitled to recover under its breach of contract claim. McKesson further seeks an adjudication
21 that FM Group is not entitled to an accounting from McKesson under the Supply Agreement in
22 equity or under contract. McKesson additionally seeks an adjudication that FM Inc. is not entitled
23 to an accounting in equity from McKesson under the First Amendment.

24 **E. The Trade Secret Materials**

25 To oppose McKesson's MSJ, Familymeds is required to file certain portions of documents
26 which address, discuss, and reveal the materials produced in discovery and the terms of the
27 Agreements. This includes the below indicated portions of the following documents:

28 ///

1 Separate Statement of Disputed, Undisputed and Additional Facts in
 2 Opposition to Motion for Summary Judgment or, in the Alternative,
 3 Summary Adjudication by McKesson Corporation at:

4 p.9, lines 2-4, 5-6, 7-11, 22-23, 25-26, and 28; p.10, lines 2-5;
 5 p.12, lines 20-21; p.16, lines 19-20; and p.17, lines 7-9.

6 Memorandum of Points and Authorities in Opposition to Motion for
 7 Summary Judgment or, in the Alternative, Summary Adjudication by
 8 McKesson Corporation at:

9 p.3, lines 17-28; p.4, lines 1, 3-11, 28; p.5, lines 1-8, 10, 12-
 10 13; p.7, line 7; and p.15, lines 12-13, 22-23.

11 Declaration of Matthew S. Kenefick in Opposition to Motion for
 12 Summary Judgment or, in the Alternative, Summary Adjudication by
 13 McKesson Corporation at:

14 Exhibit 4 (those portions marked as Exhibit 1 thereto); Exhibit
 15 5 (those portions marked as Exhibit 1 thereto); Exhibit 7; and
 16 Exhibit 8.

17 Declaration of Edgardo Mercadante in Opposition to Motion for
 18 Summary Judgment or, in the Alternative, Summary Adjudication by
 19 McKesson Corporation at:

20 p.8, line 28; and p.9 lines 1-2, 8-9.

21 Declaration of Christian Tregillis in Opposition to Motion for
 22 Summary Judgment or, in the Alternative, Summary Adjudication by
 23 McKesson Corporation at:

24 p.3, lines 14-15, 21; p.4, line 5; indicated portions of Exhibit
 25 2; indicated portions of Exhibit 4; indicated portions of
 26 Exhibit 5; and indicated portions of Exhibit 6.

27 (Collectively, the "**Trade Secret Materials**").

28 By this Administrative Motion, Familymeds seeks an order allowing it to file the Trade
 1 Secret Materials under seal to prevent disclosure of the confidential materials produced in discovery
 2 as well as the terms of the Agreements.

3 **III. LEGAL ARGUMENT**

4 The Court has the inherent authority to seal documents to protect the release of trade secrets.
 5 See Nixon v. Warner Comm., Inc., 435 US 589, 597 (1978); Hagestad v. Tragesser, 49 F3d 1430,
 6 1433-1434 (9th Cir. 1995). This extends to documents filed in connection with dispositive motions
 7 which stand to release trade secrets. See Kamakana v. City & County of Honolulu, 447 F.3d 1172,
 8 1179 (9th Cir. 2006). Local Rule 79-5 permits a party to request that all or part of document be

1 filed under seal.

2 Familymeds requests that the Trade Secret Materials be filed under seal. The Trade Secret
3 Materials include materials produced in discovery which McKesson has designated as confidential
4 and disclose, explain, and discuss the terms of the Agreements. The terms of these Agreements are
5 designated confidential and McKesson has taken the position that the terms are trade secret. This is
6 indicated by the accompanying Declaration of Matthew S. Kenefick in Support of Administrative
7 Motion to File Documents Under Seal. Accordingly, Familymeds respectfully requests that this
8 Court issue an order sealing the Trade Secret Materials.

9 **IV. CONCLUSION**

10 To prevent the unnecessary disclosure of confidential trade secrets, Familymeds requests the
11 Trade Secret Materials be filed under seal.

12 DATED: July 30, 2008

13 JEFFER, MANGELS, BUTLER & MARMARO LLP
14 ROBERT C. GEBHARDT
15 MICHAEL A. GOLD
16 MATTHEW S. KENEFICK

17 By: /s/ Robert C. Gebhardt

18 ROBERT C. GEBHARDT

19 Attorneys for FAMILYMEDS GROUP, INC., f/k/a
20 DRUGMAX, INC., a Nevada corporation and
21 FAMILYMEDS, INC., a Connecticut corporation